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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-205

GIFT WRAPPING & TYINGS ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND EASTERN RAILROADS,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT EASTERN RAILROADS

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September 27, 1978

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and EASTERN RAILROADS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EASTERN RAILROADS

QUESTION PRESENTED

Whether the action of the Interstate Commerce Commission authorizing increased rates on paper and paper products exceeded its authority.

STATEMENT OF THE CASE

On November 23, 1976, the Commission approved increases within Official Territory averaging 10 percent in the rates on certain paper articles, concluding that the resulting charges would "not, in total, exceed a just and reasonable maximum" (A. 13).* Following briefing and argument, the Court of Appeals sustained the Commission's order without opinion.

* "A. — " refers to the page number of Petitioner's Appendix.

ARGUMENT

The Questions Presented Are Not Substantial

In the case at bar, petitioner challenged the propriety of the increase on numerous grounds: 1) the adverse effect of cumulative increases; 2) the increase could not be passed on to customers; 3) the rates of other modes were so high as to bar diversion from rail; 4) demand for the product was price sensitive; 5) decentralization of production would result; and 6) departures from the long-and-short-haul provisions of Section 4 of Title 49 would result (A. 3-6). All of these contentions were resolved in favor of the proposed increase.

The 4th Section problems arose from the fact that New England lines, the Long Island Rail Road and the Southern and Western railroads did not join in the increase, thereby giving rise to departures under the long-and-short clause. But the only questions for the Commission were whether the departures were authorized under outstanding orders, and, if not, whether authorization to depart should issue.

Since the New England lines subsequently joined in the increase, the departures there disappeared. As to the Long Island, relief was sought and granted (A. 3-4).

Petitioner's sole remaining charge is that 4th Section relief was not granted by the Commission with respect to Official Territory (East) border points on interterritorial traffic from the East to the West or South. But petitioner is and was fully cognizant of the broad outstanding relief with respect to interterritorial mileage scale rates issued in *Commodity Rates East of the Rocky Mountains*, 304 I.C.C. 534, 329 I.C.C. 212. Petitioner simply argues that such outstanding relief does not extend to the rates in question, and that it, in any event, had no notice, either of the mooting out of the question with respect to the New England lines or the relief granted with respect to the Long Island.

Petitioner is in no different position than were the inland cities complaining of the 4th section relief granted the railroads in maintaining lower rates to Pacific Coast ports in *United States v. Merchants &c. Ass'n.*, 242 U.S. 178 (1916). Mr. Justice Brandeis summarized with the following:

> "It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in *Intermountain Rates Cases*, 234 U.S. 476, 485, § 4 vests in the Commission the 'primary instead of a reviewing function' to determine the propriety of a lesser rate for a longer distance; and § 13 declares that the Commission 'shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relative to the matter or thing concerning which the inquiry is had excepting orders for the payment of money.' Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is customary and proper for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted

seem to them unreasonable, or unjustly discriminatory §§ 13 and 15 afford ample remedy. Respondents contend that after the amended order was entered and the tariffs filed, they did apply to the Commission for relief 'but were denied the right of a hearing' and that 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged discriminations might result in creating infinitely more." (pp. 187-88)

Petitioner here has the same remedies available should it elect to pursue the subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 27, 1978

CERTIFICATE OF SERVICE

I, JOHN A. DAILY, a member of the bar of the Supreme Court of the United States and an attorney of record in the cause to which this certification is attached, hereby certify that on this 26th day of September, 1978, I served or caused to be served, true copies of the foregoing Brief in Opposition on counsel for all parties of record herein and on the Solicitor General of the United States, in the manner provided by Rule 33 of the Supreme Court of the United States. I further certify that as to all parties residing more than 500 miles from Philadelphia, the place of posting of this Notice, that the same were served by mail with air mail postage prepaid affixed.

JOHN A. DAILY